In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1502

AVNET, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 511 F.2d 70. The opinion of the Federal Trade Commission (Pet. App. 19a-84a) is reported at 82 F.T.C. 444.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1975. The petition for a writ of certiorari was filed on May 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in the court of appeals.

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by an alleged ambiguity in the Federal Trade Commission's administrative complaint concerning the complaint's theory of the relevant line of commerce.

2. Whether the Commission correctly determined that the sale of new parts, materials, and equipment to production-line rebuilders of automotive electrical units is a relevant line of commerce for purposes of evaluating the competitive effects of the acquisition of one manufacturer of such products by another.

STATUTES INVOLVED

The relevant portions of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, and of 5 U.S.C. 554 (formerly Section 5 of the Administrative Procedure Act), are set forth at Pet. 2-3.

STATEMENT

1. The Federal Trade Commission issued an administrative complaint in April 1969 charging that petitioner's 1965 acquisition of Guarantee Generator and Armature Co., d/b/a International Products and Manufacturing Co. (hereinafter "IPM"), violated Section 7 of the Clayton Act, 15 U.S.C. 18. After a hearing and an initial decision by an administrative law judge, the Commission concluded that the acquisition violated Section 7, and it ordered petitioner to divest itself of IPM (Pet. App. 19a-84a).

In July 1964, petitioner, a diversified company, acquired Valley Forge Products, Inc., the nation's third largest manufacturer and distributor of new parts and materials used by rebuilders of automotive electrical parts, with annual sales of almost $2 million. In January 1965, petitioner acquired IPM, the nation's largest supplier of such equipment and Valley Forge's principal competitor, with

annual sales of more than $11 million. After the acquisition of IPM, petitioner's sales to production-line rebuilders of automotive electrical parts represented about two-thirds of the total in that market. (Pet. App. 3a-4a.)

Production-line rebuilders of electrical units disassemble inoperative used units (or "cores"), discard unsalvageable parts, and rebuild the units on a production-line basis using salvageable parts from used cores and new parts purchased from rebuilder suppliers such as IPM and Valley Forge. The resulting products are sold through wholesalers for ultimate resale to consumers at prices 30 to 40 percent below the cost of the new units sold by "original equipment manufacturers" (Pet. App. 22a, n. 5).[2] Despite the price differential, the quality of the rebuilt units is comparable to that of the new units produced by OEM's (*ibid.*).

The rebuilders' price advantage depends upon the availability of the relatively low-priced new parts furnished by rebuilder suppliers such as IPM and Valley Forge. The new parts produced by OEM's are too costly for the rebuilders (Pet. App. 24a). Thus, as the Commission found, "a small group of rebuilder suppliers, led by IPM and Valley Forge, has essentially been the sole source of new parts for rebuilders since the inception of the rebuilding industry in the 1930's" (*ibid.*).

Rebuilding is also done on a much smaller scale by custom rebuilders or repair shops. They rebuild single units, usually as a service to individual customers, who are ordinarily billed directly on a parts-and-labor basis. Unlike production-line rebuilders, custom rebuilders buy their

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[2]Original equipment manufacturers, referred to in the opinions in this case as "OEM's," include the major automobile companies and other firms that produce equipment for installation on new vehicles (Pet. App. 2a).

parts primarily from OEM wholesale distributors rather than from rebuilder suppliers, despite the higher prices. (Pet. App. 26a-27a.)

The Commission found that the relevant line of commerce is direct sales of new parts, materials, and equipment by rebuilder suppliers to production-line rebuilders (Pet. App. 26a-45a), and that the effect within that market of petitioner's acquisition of IPM was substantially to lessen competition. The acquisition gave petitioner "an impregnable position atop the concentrated rebuilder supply industry with approximately 60 percent of the market, six-times greater than that of its largest competitor" (Pet. App. 66a). Moreover, "there is ample evidence to indicate that Avnet acquired IPM to diminish price competition, divide markets, and increase the already formidable barriers to entry in the industry" (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1a-18a). It upheld the Commission's market definition against petitioner's claim that sales to custom rebuilders as well as sales to production-line rebuilders should have been included (*id.* at 14a-17a), and it rejected petitioner's contention that it was deprived of administrative due process because the administrative complaint did not explicitly state that the relevant line of commerce was limited to sales to production-line rebuilders (*id.* at 10a-12a). The court stated: "[O]ur review of the record convinces us that Avnet's counsel had sufficient understanding of the issues, and sufficient time to prepare Avnet's defense, to require rejection of the argument that they were denied administrative due process when the Hearing Examiner accepted complaint counsel's definition of the term 'rebuilder'" (*id.* at 12a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioner contends (Pet. 13-19) that it was deprived of a fair administrative hearing because complaint counsel, in seeking to limit the relevant line of commerce to sales by rebuilder suppliers to *production-line* rebuilders, departed from the allegations in the complaint that referred only to "rebuilders."

Petitioner's suggestion that complaint counsel altered the theory of the case in midstream is unfounded. The complaint and the hearing record show that complaint counsel proceeded throughout on the theory that firms specializing in the manufacture of new parts for direct sale to companies that rebuild automotive electrical parts on a production-line basis compete in a distinct market that is relevant for evaluating the effects of the IPM-Valley Forge combination.

While the complaint used the term "rebuilders" rather than "production-line rebuilders," that does not mean that complaint counsel intended to include custom rebuilders in the relevant line of commerce. It means only that custom rebuilders or repair shops were not thought to be "rebuilders." Indeed, as the court of appeals stated, much of the disagreement between the parties at the time of the administrative hearing was over the proper definition of the term "rebuilder" (Pet. App. 11a). Complaint counsel adhered consistently to the position that the term referred only to production-line rebuilders; that position is consistent with industry usage of the term "rebuilder" (App. 513, 555, 932, 1132).

The real issue here, therefore, is not whether complaint counsel may shift theories in midstream, but whether the alleged ambiguity in the complaint's wording so prejudiced petitioner's defense as to deprive it of due process. In our view, the complaint gave petitioner adequate notice of the proposed line of commerce.

Petitioner defends its misreading of the complaint by pointing to an allegation that IPM made sales "to over 5,000 independent distributors and rebuilders" (App. 44). But that paragraph of the complaint merely described IPM's business and did not purport to define the line of commerce affected by the acquisition. The relevant market was described in paragraph 15 (App. 45). The references there to the number of sellers and the volume of sales gave petitioner sufficient notice that the Commission considered sales to production-line rebuilders to be the line of commerce.

Even assuming, as the court of appeals did, that petitioner's "reading of the complaint was * * * reasonable" (Pet. App. 11a), the court correctly found that petitioner's defense was not prejudiced by the ambiguity (*id.* at 11a-12a). Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-351. That finding, which rests on a careful assessment of the hearing record, does not warrant review by this Court.

2. Petitioner contends (Pet. 20-25) that the relevant line of commerce must include sales to custom rebuilders as well as production-line rebuilders. The Commission found, however, that, "while production-line rebuilders could not operate without a supply of new parts from rebuilder suppliers, custom rebuilders buy their new parts primarily from OEM wholesale distributors at prices 20-40 percent higher than those charged by the rebuilder suppliers" (Pet. App. 27a; footnote omitted).

The Commission reasonably concluded that "the tremendous disparity between the production-line rebuilders' dependence on rebuilder suppliers and the custom rebuilders' reliance on wholesalers, despite the fact that wholesalers charge a substantially higher price, indicates that sales to these two categories of rebuilders are in

different lines of commerce" (*id.* at 28a).[3] Because of the peculiar dependence of production-line rebuilders upon rebuilder suppliers, the competitive effects of a combination of two suppliers will likely be felt most directly by production-line rebuilders. Sales to production-line rebuilders constitute a relevant line of commerce even if sales to all rebuilders might also be a relevant line of commerce for some purposes.

International Tel. and Tel. Corp. v. *General Tel. and Electronics Corp.*, C.A. 9, No. 73-1513, decided April 25, 1975, does not conflict with the present case. Unlike the situation here, neither of the two classes of customers there was found to be peculiarly dependent upon a particular group of suppliers.

Petitioner acknowledges that there are "situations in which sales of similar products to different classes of customers have been placed in separate markets" because of "significant factors which provide strong support for drawing a distinction" (Pet. 23). That is precisely the situation here.

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[3]The Comission also found that "the industry itself clearly recognizes the basic practical difference between production-line and custom rebuilders as demonstrated not only by the testimony of several major rebuilders * * * but also by the existence of a separate trade association limited to production-line rebuilders and their suppliers" (Pet. App. 26a-27a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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